No. 22667

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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COLE MADSEN,

*Appellant,*

*vs.*

A. J. BUMB, as receiver and trustee, etc., etc.,

*Appellee.*

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## APPELLEE'S BRIEF.

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## APPELLEE'S BRIEF.

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### I.

### NATURE OF CASE.

This is an appeal by defendant below, Cole Madsen, from a Default Judgment entered by Irving Hill, United States District Judge, for the Central District of California on December 4, 1967, and the Order for Default Judgment also entered on December 4, 1967 [See Notice of Appeal R-411].

### II.

### STATEMENT OF FACTS.

While appellee has no real quarrel with appellant's statement of facts, as such, it is felt that it should be expanded to refer to the counter affidavits filed by appellee before the District Judge on the motion to set aside the default. These are the affidavits of A. J. Bumb [R-140]. David A. Maddux [R-137], John J. Wilson [R-131], as well as the affidavit of Wilbur G.

Dettmar, which was not designated by appellant as part of the record herein but which is referred to by the District Judge on pages 7 and 11 of the transcript of the proceedings had before him on April 24, 1967.

The Court's attention is also called to the Affidavit of Cole Madsen which, in the main, is not relevant to the issue presented on the within appeal and the same goes on for many pages making various charges against the trustee's administration and the trustee's counsel [R-87-91].

Page 10 of appellant's said affidavit [R-92] states:

> "Mr. Bumb, as trustee, has brought an order to show cause set for March 29, 1967, at 2:00 P.M. in Referee Moriarty's court for the purpose of determining the ownership of stock of Chase Capital Corporation. This is another waste of corporate assets—".

Appellee admits that said proceeding has been brought and an Order was made after very extensive hearings in connection therewith on February 21, 1968, which completely determines the stock status. The same is currently on review before U. S. District Judge William P. Gray, which review has been filed by Cole Madsen disputing the findings with respect to the capital stock. We will not comment further thereon inasmuch as this particular issue, which in effect is the same determination made in the instant case insofar as the First Cause of Action is concerned, may well be before this Honorable Court on a separate appeal in the future.

It is also felt that the Court's attention should be called to the affidavit of Vaughn R. Antablin [R-80] which indicates he obtained an extension of time to an-

swer on behalf of appellant. Appellee feels that there is great significance in the fact that the written stipulation for continuance which was *prepared by Antablin* only recites a continuance to Antablin and does not mention Madsen.

In the following argument, appellee will answer, point by point, the arguments raised by appellant in his brief on pages 5 and 6 under the heading "Specification of Errors Relied On".

## III.

## SUMMARY OF ARGUMENT.

(A) THE ORDER OF THE DISTRICT COURT DENYING APPELLANT'S MOTION TO SET ASIDE THE DEFAULT CANNOT BE REVERSED UNLESS APPELLANT CAN SHOW THAT THE DISTRICT COURT ABUSED ITS DISCRETION.

(B) APPELLANT'S POINT THAT HIS COUNSEL WAS MENTALLY ILL HAS NO BASIS IN FACT AND IS BEING RAISED FOR THE FIRST TIME ON APPEAL.

(C) APPELLANT'S "CONSTITUTIONAL RIGHTS" HAVE NOT BEEN VIOLATED.

(D) PLAINTIFF'S COMPLAINT DOES STATE A CAUSE OF ACTION AS FOUND BY THE DISTRICT COURT AND ON APPEAL FROM DEFAULT JUDGMENT, AVERMENTS OF THE COMPLAINT MUST BE ACCEPTED AS TRUE AND TRIAL COURT NEED NOT HEAR ANY FORMAL EVIDENCE ON DAMAGES.

(E) THE JUDGMENT DID NOT GO BEYOND THE COMPLAINT.

(F) THE COMPLAINT DOES, ON ITS FACE, SHOW DAMAGE CAUSED BY APPELLANT.

## IV.

## ARGUMENT.

### Introduction.

Appellee, in presenting his argument herein, will attempt to answer, point by point, and in chronological order, the specifications of alleged errors set forth by appellant in his brief on pages 5 and 6.

Appellant's argument set forth on pages 8 through 15 of his brief attempts to cover the said specifications of alleged errors and after a careful reading of said argument one is able to segregate appellant's argument (at least to some extent) into the categories which he breaks down into some seven specifications of alleged errors.

However, appellee is unable to understand what appellant is attempting to accomplish by the comments made by him in his brief on page 13, line 24 through page 14, line 5. There is some reference to the alleged "mental illness" of Mr. Antablin and possibly appellant is attempting to cover his Specification of Error II. Appellant makes reference to an alleged "deal" which, it is submitted, has no bearing on this appeal as the same is not only not in the record on appeal but not in any other record save perhaps Mr. Madsen's imagination which, apparently, knows no bounds.

It is submitted that in this appeal we must be careful to distinguish between a "default" and a "default judg-

ment". Some of the cases as well as appellant tend to discuss these terms as one while in reality they are two different creatures of law.

The default is entered by the clerk for failure of a party to plead or defend under Rule 55(a) of the Federal Rules of Civil Procedure which provides:

> "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default."

Default Judgment is covered by Rule 55(b) of the Federal Rules of Civil Procedure and may be entered by the Clerk in certain cases or by the Judge in others. Said Rule provides as follows:

> "(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can be computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.
>
> "(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing

by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judggment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

In the instant case, appellant's default was entered by the Clerk on August 4, 1965 [R-37]. Appellant's Motion to Set Aside the default was denied by the District Court on May 5, 1967 [R-276]. Default Judgment was entered against appellant by the District Court on December 4, 1967 [R-407]. From the default judgment appellant has filed his Notice of Appeal [R-411].

In the discussion below appellee will attempt to discuss these two terms separately as it is felt the principles of law governing an appeal from each have different guidelines which are followed by the appellate courts.

It is further submitted by appellee that the entire discussion of this appeal hereinbelow should also be considered in light of the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure for it is felt that said principle lends even more weight to all of appellee's arguments.

**(A) The Order of the District Court Denying Appellant's Motion to Set Aside the Default Cannot Be Reversed Unless Appellant Can Show That the District Court Abused Its Discretion.**

Appellant contends that this Honorable Court should reverse the District Court's Order refusing to set aside the default (Specification of Error I).

In his brief appellant discusses the provisions of Rule 60(b) of the Federal Rules of Civil Procedure.

However, Rule 60(b) has no application to a motion to set aside a default. Said rule, by its terms, deals with relief from "a final judgment, order, or proceeding—" and an Order denying a motion to vacate a default is not a final order as determined by this Honorable Court on October 10, 1967, in the appeal of *Madsen et al. v. A. J. Bumb etc., No. 22146.*

Although appellant's brief is not clear on this point, we assume he is now appealing from the Order of May 5, 1967, on the principle that interlocutory orders, from which no direct appeal will lie merge into the final judgment (the default judgment of December 4, 1967) and are open to review on appeal from the final judgment. *Atchison, T. & S.F. Ry. Co. v. Jackson* (10th Cir. 1956), 235 F. 2d 390. Under this principle, then, this Court can review the Order of May 5, 1967, although this appeal was taken from the judgment entered on December 4, 1967.

As stated above, Rule 60(b) does not apply to the setting aside of defaults. The setting aside of defaults is governed by Rule 55(c) of the Federal Rules of Civil Procedure, which provides, in part:

> "For good cause shown the court may set aside an entry of default. . . ."

Whether the entry of default should be set aside, however, is a matter addressed to the discretion of the District Court. *Kulakowich v. A/S Borgestad,* (D.C. Pa. 1964) 36 F.R.D. 185; *Trueblood v. Grayson Shops of Tennessee Inc.,* (D.C. Va. 1963) 32 F.R.D. 190; *Duling v. Markum,* (7th Cir. 1956) 231 F. 2d 833; and his actions are not lightly to be disturbed by an appellate court. *Hiern v. St. Paul Mercury Indem. Co.,* (5th Cir. 1959) 262 F. 2d 526.

It is submitted that appellant has failed to show that the District Court abused its discretion in refusing to set aside the default and therefore this Honorable Court must affirm that Order.

The District Court, in denying appellant's motion to set aside the default, indicated it was aware of the general rule that relief from default should not be unreasonably denied [R-276, lines 28-32] and went on to find that appellant did not show "good cause" for relief under Rule 55(c) in that *(1) he failed to show excusable neglect, and (2) he failed to show that he has a meritorious defense to the action.*

The District Court, in connection with said motion, disbelieved the testimony and version of facts offered by appellant and Mr. Antablin and believed the testimony and version of facts offered by appellee's counsel.

In short, the District Court's findings, as aforesaid, are not "clearly erroneous" and were amply supported by the evidence and no showing can be made that the District Court abused its discretion in connection therewith under the principles laid down in such cases as *Ferraro v. Arthur M. Rosenberg Co.,* (2nd Cir. 1946) 156 F. 2d 212 and *Bowles v. Branick,* (D.C. Mo. 1946) 66 F. Supp 557.

**(B) Appellant's Point That His Counsel Was Mentally Ill Has No Basis in Fact and Is Being Raised for the First Time on Appeal.**

Appellant now urges this Court as grounds for reversing the Order of the District Court refusing to set aside appellant's default that "Appellant was deprived of proper or any legal representation at the hearing—in that his counsel—was incapable at the time."

It will be noted from the record that this point was never urged before the District Court and there is no evidence on it.

Appellant now proposes to make his argument to this Honorable Court on the basis of three psychiatrist's reports which appellant has attached to his brief. These reports were not part of the record on appeal (as they would clearly be inadmissible as hearsay) and they cannot be considered by this Honorable Court on appeal of this case.

If this Court does determine that it wishes to consider said reports, we feel it would be important for the Court to know that on the basis of said reports the Superior Court, by virtue of an Order entered on May 20, 1968, determined that Vaughn R. Antablin was sane and was capable of standing trial. Attached hereto, marked "Exhibit A" and by reference made a part hereof, is a copy of said Order.

Even if these reports were a part of the record, we are not so sure they say what appellant contends they do and furthermore appellee is not aware of any law that states that a person is entitled to be represented by an attorney, as a matter of right, in a *civil* action.

Appellant cites three cases in his brief for the proposition that a party is entitled to be represented by an attorney as a matter of right.

The first case cited by appellant is the case of *In re Evenod Perfumer Inc.,* (2nd Cir. 1933) 67 F. 2d 878, which held that an attorney for a bankrupt is not entitled to compensation from the estate for unsuccessfully contesting an involuntary petition. The Court did mention, as dictum, that a debtor was entitled to counsel in a bankruptcy proceeding.

The second case cited by appellant is *Mintz v. Irving Trust Co.,* 54 S. Ct. 455, which is a *per curiam* decision denying certiorari from the *Evenod* case.

The third case is *In re Huntington & Broad Top Mountain R. R. Coal Co.,* 213 F. 2d 411, which involved questions of standing to appeal in a railroad reorganization case under the bankruptcy act.

In short, the cases cited by appellant don't have the slightest application to the case at bar and the "argument" raised by appellant on this point is spurious at best.

The closest authorities in point which appellee was able to find are the annotations contained in 24 A.L.R. 1025, 64 A.L.R. 436 and 74 A.L.R. 2d 1420, which deal with insanity of counsel in *criminal* matters. However, even if we apply the cases dealing with criminal matters, it is stated in 64 A.L.R. 436 on pages 439 and 440:

> "In *Hagan v. United States,* (1925; C.C.A. 8th) 9 F.2d 562, the defendant sought to show by affidavit that after the termination of the trial in the lower court he learned that his attorney, 'at the

trial, was suffering from grave mental and physical disorders, and was therefore unable to properly defend him.' Defendant also submitted an affidavit from a physician claiming to be in charge of a sanitarium in which attorney for the defendant was confined, to the effect that the attorney was suffering from 'manic depressive insanity of the manical type.' The affidavit stated further that the physician 'understood' that counsel's trouble dated back a number of years, and that he was unable completely to perform any intelligent labor in connection with his law practice for at least a year or more prior to coming to his sanitarium. This state of facts was urged as ground for a new trial, after conviction. . . . In refusing a new trial, the court said: 'A careful examination of this entire record evinces no lack of ability or alertness on the part of counsel for Hagan, either during or after the trial. . . . Also, this case was tried before an able judge of long experience, and it seems incredible that this counsel could have been mentally incompetent at the time of and in connection with this trial and no suspicion have occurred either to the judge, or to Hagan himself. The record shows a careful trial and a spirited defense in the face of overwhelming proof of guilt.' "

### (C) Appellant's "Constitutional Rights" Have Not Been Violated.

Appellant, in his brief, makes the flat statement that his "rights have been violated under the 1st, 4th, 5th, 7th and 14th Amendments to the Constitution of the United States".

Appellant, however, does not point out how and wherein these rights have been allegedly "violated". A search of the record is of no help since he is also raising these points for the first time on appeal.

Appellant was given adequate notice and an opportunity to be heard at all proceedings before the District Court, and as pointed out above a party is not guaranteed a right to counsel by the Constitution in civil cases although appellee contends that appellant *was* adequately represented by counsel in the Court below.

### (D) Plaintiff's Complaint Does State a Cause of Action as Found by the District Court and on Appeal From Default Judgment, Averments of the Complaint Must Be Accepted as True and Trial Court Need Not Hear Any Formal Evidence.

As determined by the District Court, appellee's complaint does state a cause of action for relief under California Civil Code §3439.07 which provides:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Appellant's brief attempts to speak of fraudulent misrepresentation actions (p. 10, lines 14-19); however, this was not plaintiff's theory of recovery.

Plaintiff's theory of recovery was under the aforesaid Civil Code section via Section 70(e) of the National Bankruptcy Act [Title 11 U.S.C. § 110(e)] which gives the trustee the rights of any creditor under Federal or State law. This is the same theory ad-

vanced by the trustee in the case of *Eisenrod v. Utley,* (9th Cir. 1954) 211 F. 2d 678, which case is strikingly similar to the case at bar.

Appellant contends further that he should have been allowed to put on evidence at the default judgment hearing on November 30, 1967.

As will be noted from the provisions of Rule 55(b), the Clerk can enter default judgment when plaintiff's claim is for "a sum certain or for a sum which can by computation be made certain" and default judgment must be entered by the judge "in all other cases".

As will be noted from the Order for Default Judgment [R-408] the District Court determined that plaintiff's claim was for a sum certain or for a sum which can by computation be made certain within the meaning of Rule 55(b)(1). The District Court further found that, *in the event* such determination was error, that no evidence, as such, was necessary under Rule 55(b)(2) and the default judgment was also being entered by the Judge.

In the event the District Court was correct in its determination that the default judgment was properly entered by the clerk under Rule 55(b)(1) then it is submitted that there can be no question but that no hearing whatsoever was necessary and certainly no evidence could be submitted by appellant.

Appellant, however, argues that under Rule 55(b)(2) he was entitled to put on evidence *re* alleged offsets, etc.

Rule 55(b)(2) merely provides that the Court "*may* conduct such hearings or order such references as it deems necessary". This appears to leave it entirely

within the *discretion* of the District Court whether to hold any hearings at all on damages and certainly no hearing was necessary as *the District Court found that plaintiff's claim was a liquidated claim.* The cases cited by appellant hold that a hearing is necessary of the damages are unliquidated and even then a *hearing* is had—not a trial. *Creedon v. Randolph,* (5th Cir. 1948) 165 F. 2d 918; *Pope v. U.S.,* (1944) 323 U.S. 1; *Klapprott v. U.S.,* (3rd Cir. 1948) 166 F. 2d 273; *United States v. Borchers,* (2nd Cir. 1947) 163 F. 2d 347.

Also, the Court's attention is called to Rule 7(g) of the Rules of the United States District Court, Central District of California, which provides for the filing of affidavits under Rule 55(b)(2) situations to establish damages.

The present appeal is from a default judgment and on such an appeal the appellate court must accept the averments of the complaint as true. *Massa v. Jiffy Products Co.,* (9th Cir. 1957) 240 F. 2d 702, cert. den. 353 U.S. 947; *Northwestern Yeast Co. v. Broutin,* (6th Cir. 1943) 133 F. 2d 628.

### (E) The Judgment Did Not Go Beyond the Complaint.

Appellant attempts to make the argument (as he did before the District Court) that plaintiff's complaint merely prayed for an accounting as to the First Cause of Action and therefore it was error to grant a money judgment.

However, the Court's attention is called to page 22, lines 9 through 12 of the complaint [R-22] which prays:

> "That *judgment be had* against all Defendants for recovery of stock *and everything of value* received by them or their agents acting for them from and after May 5, 1960, for which they did pay to the bankrupt corporation full value." (Emphasis added).

### (F) The Complaint Does, on Its Face, Show Damage Caused by Appellant.

Appellant further makes the argument (as he did before the District Court) that appellee's complaint does not show any damage because of the fact that it alleges Chase Capital received the Atwater Capital "debentures" of over $800,000.00.

However, it is again pointed out to appellant (as it was before the District Court) that the next page of the complaint (p. 14, line 29 *et seq.*) alleges that said "debentures" or unsecured promissory notes are valueless, and in connection therewith the Default Judgment [R-407] provides that upon payment of said judgment the trustee is to return the Atwater "debentures" to defendant-appellant.

## V.
## CONCLUSION.

It is therefore respectfully submitted that this Honorable Court should affirm the judgment of the District Court as appellant's default cannot be set aside as he has not shown good cause within the meaning of Rule 55(c) F.R.C.P., nor has he shown that he has any meritorious defense to the action and the District Court therefore did not abuse its discretion in denying appellant's motion.

Further, the default judgment conforms to the complaint, and accepting all of the averments of the complaint as true, the default judgment must be affirmed.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,
By ROBERT A. FISHER,
*Attorneys for Appellee.*

## Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FISHER

## EXHIBIT A.

### Order of May 28, 1968.

Superior Court of the State of California, for the County of Los Angeles.

May 14, 1968, Pearce Young, Judge, Department No. 110, R. C. Johnson, Clerk, Russ Williams. Reporter.

APPEARANCES:

(Parties and Counsel checked if present.)
(Counsel shown opposite parties represented.)

Case No. A218309, The People of the State of California, X Evelle J. Younger, District Attorney by B. Campbell and R. Corn Deputy, vs. X Vaughn Robert Antablin, X P. Caruso

It, appearing that the Minute Order of April 29, 1968 in Department 110 does not truely reflect the order of the Court on that date, it is now ordered corrected nunc pro tunc by adding after the words, "present sanity" the following: "Criminal proceedings suspended.". Matter comes on for sanity hearing. Karl Otto Von Hagen, Anthony DiNolfo, Fredrick Hacker, George Y Abe and Alvin E. Davis are sworn and testify for the defendant on issue. Sanity issue is argued. The Court finds the defendant is presently sane, can cooperate in his defense and does understand the nature of proceedings. Criminal proceedings are resumed.

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office. Attest Jun. 12, 1968, William G. Sharp, County Clerk and Clerk of the Superior Court of the State of California, for the County of Los Angeles. By Kathrene L. Mills, Deputy.

This Minute Order Was Entered May 20, 1968. William G. Sharp, County Clerk, and Clerk of the Superior Court.